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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSION, individually and on behalf of a class,

Plaintiffs-Appellees,

v.

MOHAWK INDUSTRIES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION

REPLY BRIEF OF APPELLANT MOHAWK INDUSTRIES, INC.

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ARGUMENT AND CITATIONS OF AUTHORITY

Mohawk Industries, Inc. ("Mohawk") demonstrated in its opening brief that Appellees' complaint suffers from several fatal defects, any one of which mandates dismissal. A common thread runs through these flaws: Appellees seek to stretch the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., into something it is not. They want to use that statute—intended to provide a cause of action against criminals who infiltrate and corrupt businesses—as a vehicle through which some employees may challenge a legitimate manufacturer's hiring and compensation practices. Appellees allege that Mohawk violated RICO through its own employees and agents, and they seek a purely speculative retroactive wage increase.

As the Seventh Circuit recognized earlier this year in a factually indistinguishable case, Appellees' effort is doomed as a matter of law. *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir. 2004), *cert. denied*, 2004 WL 2070652 (U.S. Nov. 1, 2004) (04-149). Under RICO's express provisions, Appellees' RICO claim fails to allege participation through predicate acts in any RICO "enterprise" (other than the defendant itself); fails to allege any "enterprise" with a unified structure and common purpose; and fails properly to allege any cognizable

injury proximately caused by the defendant's conduct. Appellees' state statutory and common law claims are likewise insufficient as a matter of law.

In its response, Appellees' invoke decisions from the Supreme Court and other circuits that only serve to shine more light on the defects in Appellees' complaint. They also repeatedly seek shelter behind legal conclusions, when the facts they allege in their complaint demonstrate that Appellees cannot state a claim. For these reasons, and those provided in Mohawk's opening brief, this Court should reverse the portions of the district court's order denying dismissal of Appellees' complaint and instruct the court to dismiss the complaint with prejudice.

I. APPELLEES' FEDERAL RICO CLAIM FAILS AS A MATTER OF LAW.

A. By Hiring Employees, Mohawk Only Participates in Its Own Affairs—Not Those of a RICO Enterprise.

As Mohawk explained in its opening brief, Appellees' Complaint fails properly to allege an indispensable element of a RICO claim—Mohawk's participation in some "enterprise" other than itself. *See* MBr.[1] at 9-14. The Supreme Court has made clear that RICO "liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,'

[1] Throughout this reply, "MBr." refers to Mohawk's opening brief.

not just their *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993). Appellees' complaint fails to plead the facts necessary to meet this basic test for two independent reasons discussed below in turn.

1. When a Corporation Is a RICO Defendant, the Corporation and Its Agents Cannot Be a RICO "Enterprise."

Corporations are artificial entities that act *only* through agents. The fundamental requirement that the RICO defendant be distinct from the RICO enterprise would therefore become a dead letter if plaintiffs could sue a corporation as a RICO defendant, while alleging that the corporation and its agents comprised a RICO "enterprise." *E.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midlands Bank*, 30 F.3d 339, 344 (2d Cir. 1994). For this reason, the courts have consistently held that such allegations do not state a RICO claim. *See* MBr. at 10 (collecting cases).[2] Appellees attack this black-letter RICO law from several angles, but none is availing.

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[2] It is beyond dispute that if Mohawk had used exclusively its own employees to recruit other prospective employees, there would be no RICO enterprise. And as another circuit court reasoned, "[w]hat possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that [Mohawk used third-party recruiters rather than its own employees]?" *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997).

Appellees argue that a RICO enterprise *can* be comprised of nothing more than a corporation and its agents. *See* ABr.[3] at 12-14. Appellees attempt to find support in the Supreme Court's decision in *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001), which, they suggest, *sub silencio* overruled the line of cases relied upon by Mohawk. In reality, *Cedric Kushner* disparages the same kind of enterprise Appellees here allege, calling it an "oddly constructed entity." *Id.* at 164.

Cedric Kushner held that the president of a closely held corporation could be a RICO defendant, with the corporation serving as the RICO "enterprise." *Id.* at 160. This was a quintessential fact pattern under RICO, which was intended to target criminals who take over companies and turn them into racketeering enterprises. *See Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (discussing "prototypical" RICO cases). In such a case, the RICO defendant and the enterprise are distinct, such that RICO's requirement that the defendant be "employed by or associated with" the enterprise is naturally satisfied. 18 U.S.C. § 1962(c).

Cedric Kushner did not involve the converse situation—such as that alleged by Appellees here—in which the RICO defendant is the corporation, and

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[3] Throughout this reply, "ABr." refers to Appellees' brief.

the corporation plus its own agents purportedly constitute the RICO "enterprise." The Court in *Cedric Kushner* explained that such a fact pattern involved "quite different circumstances which are not presented here." 533 U.S. at 164. Indeed, the Court expressed great skepticism regarding the type of enterprise alleged by Appellees in the instant case. In cases where "a corporation was the 'person' and the corporation, together with all its employees and agents, were the 'enterprise,'" the Court continued, "[i]t is less natural to speak of a corporation as 'employed by' or 'associated with' this latter oddly constructed entity." *Id.* It is just such an "oddly constructed entity," rather than an "enterprise" of the kind at issue in *Cedric Kushner*, that Appellees proffer in this case. In fact, Appellees cite no case that has accepted such an enterprise as being distinct from a corporate defendant.

Appellees fare no better by invoking *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271 (11th Cir. 2000), as support for their contention that recent RICO case law has silently worked a revolution in the scope of the RICO "enterprise." *Goldin* in fact had nothing to do with agency. In that case, *three* corporations insisted that they could not be both RICO defendants and, taken together, a RICO enterprise because they "were offshoots" of the same company and "had overlapping ownership." *Id.* at 1276. It was in the course of rejecting that argument (not any claim to an agency relationship) that the Court noted that

the corporations were "separate and distinct" and "free to act independently." *Id.* at 1277.[4]

Appellees also try and fail to show that even if a corporation and its agents cannot be an enterprise when the corporation is the RICO defendant, their complaint survives. First, Appellees erect a strawman and then knock it down by arguing that a RICO enterprise may be an "association in fact," rather than a formal, legal entity. ABr. at 8-9. Mohawk has never disputed that such an "enterprise" is possible—the RICO statute explicitly contemplates it, *see* 18 U.S.C. § 1961(4)—but has instead demonstrated that Appellees have not properly alleged it here because the only "association in fact" alleged consists of Mohawk and its agents.

Appellees next point to their Complaint's allegation that "third party" employment agencies "supply Mohawk with illegal workers" and contend that their allegation of an "enterprise" is saved because these agencies are entities "distinct" from Mohawk. ABr. at 10-11 (quoting Compl. ¶ 76). But as Appellees elsewhere acknowledge, an agency relationship *always* involves entities or people

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[4] Also inapposite is *Chen* v. *Mayflower Transit, Inc.*, 315 F. Supp. 2d 886 (N.D. Ill. 2004). In that case, an "enterprise" was present because an agreement between the RICO defendant and its putative agents explicitly stated that "[t]he parties agree that they have not established a partnership, cooperative, joint venture, franchise or any other business relationship." *Id.* at 903.

with "'separate legal personalities.'" *Id.* at 12-13 (quoting *Restatement (Third) of the Law of Agency* § 1.01 cmt c (Tentative Draft No. 2 2001)). Accordingly, Appellees' contention that the mere separateness of Mohawk and the recruiters allows them to combine in a RICO enterprise would completely eviscerate the black-letter rule that a RICO enterprise cannot "consis[t] merely of a corporate defendant associated with its own employees or agents." *Riverwoods Chappaqua Corp.*, 30 F.3d at 344.[5]

Appellees attempt to circumvent this rule by pointing out that they have not specifically "alleged that the third-party recruiters are Mohawk's agents." ABr. at 11. The absence of such a legal conclusion in the complaint is immaterial. In considering a motion to dismiss, a court is not bound by a complaint's legal conclusions; *a fortiori* it is not bound by their absence. *See Solis-Ramirez* v.

[5] Equally unavailing is Appellees' attempt to distinguish *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997), on the purported ground that the agents in that case worked "exclusively" for the RICO defendant. In making this argument, Appellees tellingly provide no specific citation to *Fitzgerald*'s reasoning, and in fact that decision nowhere mentions, much less relies on, any "exclusive" relationship between the defendant and its agents. Instead, agency alone—exclusive or not—was enough to defeat the allegation of a RICO "enterprise" in *Fitzgerald*. *Id.* at 227-228 ("What we cannot imagine, and what we do not find any support for in appellate case law, is applying RICO to a free-standing corporation . . . merely because [it] does business through agents, as virtually every manufacturer does."). Moreover, it is black-letter law that an agent can serve more than one principal and still be an agent. *See Restatement (Third) of Agency* § 3.14, cmt. b (Tent. Draft 3 2002).

United States Dep't of Justice, 758 F.2d 1426, 1429 (11th Cir. 1985) ("The district court is not required to accept as true appellant's conclusions of law when considering a Rule 12(b)(6) motion to dismiss. . . . On the contrary, the court may make its own determination of the legal issue" (internal citation omitted)); *see also Restatement (Second) of Agency* § 1, cmt. b (1958) (existence of an agency relationship is a question of law).

What matters is that a straightforward reading of the complaint's own factual allegations establishes an agency relationship between Mohawk and the recruiters. *Compare* Compl. ¶ 76 (recruiters locate workers on Mohawk's behalf and at its direction) *with Restatement (Second) of Agency* § 1 (agency relationship established when party agrees to "act on [principal's] behalf and subject to his control"); *see generally Waldo* v. *North Am. Van Lines, Inc.*, 669 F. Supp. 722, 737-39 (W.D. Penn. 1987) (plaintiff "failed to properly plead a RICO 'enterprise'" comprised of corporate defendant and its "agent-recruiters"). Appellees' own complaint alleges that Mohawk used agents who hired and recruited workers. Such allegations establish that Appellees have not pled and cannot plead a valid RICO enterprise distinct from Mohawk itself. *See, e.g.*, *Fitzgerald*, 116 F.3d at

225 (affirming 12(b)(6) dismissal of RICO complaint because "enterprise" alleged in complaint was comprised of defendant and its agents).[6]

2. As the Seventh Circuit Has Held, a Corporation Does Not Participate in a RICO Enterprise by Using Third-Party Recruiters to Hire Employees.

Even if the third-party recruiters alleged in Appellees' complaint were not Mohawk's agents, Appellees would still fail to state a claim. Whatever the recruiters' legal relationship with Mohawk, the company uses them only to hire its own employees. Accordingly, here, as in *Baker* v. *IBP, Inc.*, "[t]he nub of the complaint is that [Defendant] operates *itself* unlawfully," and there can be no RICO claim. 357 F.3d at 691-92 (emphasis in original).

Appellees assert that Mohawk "participates" in the affairs of an "enterprise" comprised of Mohawk and its recruiters, but the very portion of Appellees' brief that advances this argument demonstrates that *all* of Appellees' allegations involve Mohawk's participation in its own affairs. *See* ABr. at 15 (Mohawk "using and harboring illegal workers"; "knowingly employing and accepting false documents from illegal workers"; "obtaining illegal workers"). That Mohawk may have used recruiters to locate these workers does not somehow

[6] This case is therefore unlike *Begala* v. *PNC Bank*, 214 F.3d 776 (6th Cir. 2000), where the pleadings did not include factual allegations supporting the existence of an agency relationship. *See id.* at 781.

transform the every-day corporate act of hiring an employee into "participation" in some "enterprise" beyond the corporation itself.

Appellees contend that the Seventh Circuit's common-sense analysis in *Baker* is somehow inconsistent with this Court's precedents. Far from undermining *Baker*, the principal decision Appellees invoke as support merely reinforces *Baker* by demonstrating in detail what participation in a *real* RICO "enterprise" looks like. *See United States* v. *Pipkins*, 378 F.3d 1281 (11th Cir. 2004). *Pipkins* involved a criminal RICO prosecution of two pimps who were part of a syndicate that collectively controlled the prostitution trade in part of southwest Atlanta. The Court found the existence of a RICO enterprise in part on these facts:

> While all the pimps did not pool their profits from prostitution, some did. And the pimps generally aided each other. Pimps bailed each other's prostitutes out of jail; mentored younger pimps; swapped prostitutes with each other to get a better "fit;" warned other pimps and their prostitutes of the presence of police; provided condoms, rides, and rooms for each other's prostitutes; jointly organized private prostitution parties; recruited juvenile prostitutes together; recruited juvenile prostitutes for each other; divided the track geographically to reduce competition; and traveled out of town together to prostitute females in other cities. Pimps also operated as a price-fixing cartel to regulate the prices that their prostitutes charged for different sexual services.

Id. at 1286.[7] *That* is what a RICO enterprise looks like,[8] and the pimp-defendants

[7] The passage from *Pipkins* that Appellees quote, *see* ABr. at 18-19, hardly stands for the proposition that two pimps constituted an "enterprise" because one recruited prostitutes for the other. This passage comes at the end of an extended discussion of the relationship between the two pimps, who, among other things, jointly "kept a stable of juvenile prostitutes," lived together, had a "symbiotic business relationship," and "supervised each other's prostitutes and collected the money they earned." 378 F.3d at 1290-91.

[8] The "prototypical" RICO case involves prosecution of an *individual* defendant who uses a corporation or other entity for racketeering. *See Fitzgerald*, 116 F.3d at 227. Indeed, that was the fact pattern in *United States* v. *Muyet*, 994 F. Supp. 501 (S.D.N.Y. 1998), cited by Appellees at 14 n.13. *See also United States* v. *Massey*, 89 F.3d 1433, 1440 (11th Cir. 1996) (individual defendant participated in corruption of an enterprise—the circuit court system—through bribery); *United States* v. *Castro*, 89 F.3d 1443, 1459 (11th Cir. 1996) (same); *United States* v. *Norton*, 867 F.2d 1354, 1357 (11th Cir. 1989) (individual defendant-union officials took kick backs in exchange for entering into employee benefit contracts on behalf of the union); *United States* v. *Hewes*, 729 F.2d 1302, 1307-08 (11th Cir. 1984) (individual defendants used sham corporations to bilk creditors). Only slightly less outlandish is Appellees' citation to *United States* v. *Starrett*, which involved the prosecution of an individual RICO defendant for participating in a motorcycle gang with elected officers and elaborate rules and regulations. *See* 55 F.3d 1525, 1533-34 (11th Cir. 1995). The facts here, in which the corporation itself (not any individual) is the RICO defendant, are entirely different. Rejecting Appellees' creative bid for a retroactive wage increase will have little, if any, impact on the criminal use of RICO. Indeed, nothing in Mohawk's rule would affect the RICO liability of a corporation that truly participates in some larger association of corporations or (non-agent) individuals by engaging in racketeering activities on the enterprise's behalf. *See, e.g.*, *Goldin*, 219 F.3d at 1273 (discussing defendant-corporations' "various schemes").

clearly participated in it.[9] What Appellees allege here—a corporation hiring employees with the help of recruiters—is orders of magnitude different. Appellees have simply not alleged Mohawk's participation in any enterprise other than itself.

Nor do Appellees succeed in their half-hearted effort to distinguish the Seventh Circuit's decision in *Baker*, which squarely forecloses their "enterprise" theory. The complaint in that case, just like the one here, alleged the involvement of third-party recruiters in the defendant's alleged hiring of undocumented workers. *See Baker*, 357 F.3d at 687 (discussing role of third-party "'recruiters'" in smuggling deported employees back into country and role of "immigrant-welfare organizations" in "refer[ring] known illegals to [defendant] for employment"). The Complaint's allegation that some workers "belong" to a recruiter while working for Mohawk, ABr. at 21, does not change this analysis at all. The point is that Appellees' complaint challenges *Mohawk's* method of recruiting, obtaining, and hiring a workforce to conduct Mohawk's manufacturing business. This fundamental fact is not changed by Appellees' allegations.

[9] As demonstrated by this discussion, a proper understanding of what it means to participate in a RICO "enterprise" would not "bar important criminal RICO prosecutions," such as *Pipkins*. *See* ABr. at 19. Indeed, this proper understanding is shared by numerous jurisdictions and has not imposed any apparent difficulties

Accordingly, just as in *Baker*, "[t]he nub of the complaint is that [Defendant] operates *itself* unlawfully," 357 F.3d at 691-92, and thus the complaint does not state a claim.

B. Appellees' Complaint Fails to Allege the Existence of an Enterprise with a Unified Structure and Common Purpose.

As Mohawk demonstrated in its opening brief, Appellees have failed properly to allege that the purported "enterprise" they identify has a common purpose. MBr. at 14. Indeed, the Seventh Circuit has noted this very defect in a complaint materially indistinguishable from the one here. *See Baker*, 357 F.3d at 691. Appellees' only response is to point to the portion of their complaint alleging that "'[t]he recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk,'" and to suggest that all hoped to make money. ABr. at 22 (quoting Compl. ¶ 77). Such conclusory allegations do not overcome the fundamental irrationality inherent in the allegation of "common purpose" identified by the Court in *Baker* and equally applicable here and are therefore insufficient to save the complaint. *See Associated Builders, Inc.* v. *Alabama Power Co.*, 505 F.2d 97, 100 (11th Cir. 1974) ("Conclusory allegations and unwarranted deductions of fact are not admitted as true.").

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on the Government's ability to prosecute RICO cases. *See* MBr. at 10 (collecting cases).

II. APPELLEES LACK STANDING BECAUSE THEY HAVE SUFFERED NO PROXIMATELY CAUSED INJURY TO BUSINESS OR PROPERTY.

A. Appellees Have Suffered No Injury to "Business or Property."

As Mohawk explained in its opening brief, Appellees' desire for a retroactive wage increase is too abstract, intangible and speculative to constitute an injury to their "business or property" as is required to confer standing under RICO. Critically, Appellees nowhere claim that Mohawk did not pay their agreed-upon wage.[10] Accordingly, because "plaintiffs do not allege that they received something different than precisely what they bargained for," they suffered no cognizable injury. *Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 606-07 (5th Cir. 1998).

In response, Appellees rely principally on the Supreme Court's antitrust decision in *Hanover Shoe* v. *United Shoe Machine Corp.*, 392 U.S. 481 (1968), and the Ninth Circuit's decision in *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002). But both cases included a critical element not present here: a defendant's market power. The seller of shoe-making machinery in *Hanover*—

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[10] Appellees protest that they "have not alleged any contract for a specific wage," ABr. at 26, but no fair reading of the complaint would support the bizarre notion that Appellees' went to work for Mohawk without an understanding of what their compensation was to be. Mohawk's point is that Appellees have not alleged that this understanding—whether or not memorialized in a written contract—is incorrect.

whose inflated prices provided the basis for standing in the passage quoted by Appellees, *see* ABr. at 27—had been found liable in an action by the United States of *monopolizing* the market. *See* 392 U.S. at 483-84; 486 n.3. The buyer-plaintiff accordingly had nowhere else to go for the machinery; it clearly was injured by the inflated prices it had no choice but to pay. Likewise, the complaint in *Mendoza* included an allegation of market power, *see infra* Section II.B, so the employee-plaintiffs' ability to escape the low wages resulting from the defendant's conduct was artificially constrained. Here, where there is no allegation of market power limiting Appellees' ability to work elsewhere, the fact that they received "precisely what they bargained for," *Price*, 138 F.3d at 606-07, is dispositive.[11]

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[11] Appellees attempt to distinguish *Turnquist* v. *Elliott*, 706 F.2d 809 (7th Cir. 1983), and *Danielsen* v. *Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220 (D.C. Cir. 1991), on the ground that they "involve claims that the defendant failed to pay the plaintiff a wage set by statute." ABr. at 25 n.24. That distinction actually makes Appellees' claim to a higher wage *weaker* than those in *Turnquist* and *Danielsen*. In those cases, the courts found that employees had no property interest in a wage beyond that they agreed to with their employer *even when they alleged the higher wage was mandated by statute*. *See Turnquist*, 706 F.2d at 812; *Danielsen*, 941 F.2d at 1229. Here, by contrast, Appellees had no statutory right to a particular wage (beyond minimum wage), so their claimed property interest in compensation beyond what they agreed to accept is even weaker.

Likewise, Appellees gain no traction through their purported analogy to gender discrimination cases. *See* ABr. at 26. Unlike RICO, neither Title VII nor any other discrimination law requires an injury to "business or property." Similarly, the difference between the wages of female employees affected by discrimination and the wages of comparable male employees is measurable, unlike the value of diminished power in the labor market resulting from some incremental

B. Appellees' Damages Theory Is Impermissibly Speculative.

As Mohawk explained in its opening brief, Appellees' damages theory is not only speculative but also fundamentally illogical. In considering a virtually indistinguishable complaint, Judge Easterbrook cogently explained why this is so. *See Baker*, 357 F.3d at 692. Appellees' entire cause of action depends on a court's ability to quantify the amount by which their wages were depressed due to their employer's decision to hire *other* workers. It is the *inherently* speculative nature of this theory that renders it incapable of meeting RICO's standing requirements. Contrary to Appellees' arguments, *see* ABr. at 28, no amount of discovery or expert testimony can salvage it.[12]

Moreover, Appellees' damages theory simply makes no sense. *See Baker*, 357 F.3d at 692. If Mohawk had attempted to pay below-market wages

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increase in the number of illegal workers.

[12] Appellees' assertion that this Court effectively endorsed speculative damages in RICO cases in *Maiz* v. *Virani*, 253 F.3d 641 (11th Cir. 2001), is flatly wrong. In fact, that case actually reiterated the rule that "damages may not be determined by mere speculation or guess." *Id.* at 664 (internal quotation marks omitted). *Maiz* involved RICO plaintiffs' effort to recover money provided defendant as part of a fraudulent scheme and to recover the lost profits they would have earned had they not been bilked. This last category of damages was not at all speculative because plaintiffs proved that they would have invested the money in real estate but for defendants' scheme and offered expert testimony on the specific, easily quantified results they would have achieved during the relevant historical time period. *See id.*

because of its use of undocumented employees, then *all* of its legal employees, including Appellees, would have left to work somewhere else. They accordingly would have suffered no damages. Only if Mohawk could single-handedly establish wage rates could it actually have suppressed Appellees' wages. Yet, as Appellees now concede, *see* ABr. at 29 n.29, such an allegation of market power appears nowhere in their complaint. Without an allegation of market power, the Appellees' conclusory allegations that their wages were depressed are fundamentally irrational and may be disregarded. *See Lerma* v. *Univison Comms., Inc.*, 52 F. Supp. 2d 1011, 1025 (E.D. Wis. 1999) ("To survive a motion to dismiss, a claim must make economic and factual sense.") (citing *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984)).[13]

Appellees' reliance upon the Ninth Circuit's decision in *Mendoza* is simply misplaced. There, the district court had dismissed the employees'

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[13] Contrary to Appellees' suggestion, *see* ABr. at 23-24, there was nothing speculative, irrational, or conclusory about the allegations of injury in *NOW* v. *Scheidler*, 510 U.S. 249 (1994). Plaintiffs there alleged that the defendants' extortion injured them when they used "threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253-54; *see also id.* at 256 ("[Plaintiffs] alleged in their complaint that [defendants] conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. . . . In addition, [plaintiffs] claimed that [one defendant] threatened [a] clinic administrator with reprisals if she refused to quit her job at the clinic.").

complaint on the ground that their damages theory was too speculative and did not account for the wages paid by other employers in the relevant market. *See* 301 F.3d at 1170-71. "The difficulty with this reasoning," the Ninth Circuit explained, "is that the employees allege that the growers singularly have the ability to define wages in this labor market, akin to monopsony or oligopsony power." *Id.* at 1171. The Ninth Circuit concluded that "[f]or now, it is sufficient that the employees have alleged market power—they must not be put to the test to prove this allegation at the pleading stage." *Id.* Here, by contrast, the Appellees have *not* "alleged market power." Lacking this indispensable element, their complaint accordingly fails even under the Ninth Circuit's analysis.[14]

C. Appellees Are, at Most, Indirect Victims of the Alleged RICO Violations.

As Mohawk explained in its opening brief, Appellees lack standing for another reason: they are, at most, indirect victims of Mohawk's alleged

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[14] Although *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004), did not use the term of art "market power," it made clear that the employees there, as in *Mendoza*, alleged they had "no choice" but to continue working at their employer notwithstanding their below-market wages. *Id.* at 619. Appellees' attempt to bolster their economic theory by citing federal immigration legislation fails for similar reasons. *See* ABr. at 31-32. By definition, statutes are applicable to all employers. Penalties for employing illegal immigrants therefore deter all employers from engaging in hiring activity that *collectively* would affect the labor market and generally depress wages. Such macroeconomic effects, however, say nothing about the impact of undocumented hiring by a single employer without market power.

conduct. *See* MBr. at 22-24. As the Supreme Court has explained, RICO proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Here, if there are any direct victims of the alleged conduct, it is the undocumented workers who are not in a position to bargain over terms of employment. Appellees' alleged injuries are no more direct than those of any other employee in the State whose wages, according to Appellees' theory, also should have been depressed by Mohawk's expansion of the labor pool and resulting decrease in demand for legal workers.

Appellees' only response is that they are direct victims because their complaint says they are. *See* ABr. at 35. Again, however, this Court is not constrained by conclusory allegations in the complaint that are not properly supported by its factual allegations. *See Associated Builders, Inc.*, 505 F.2d at 100. Appellees are simply not direct victims as participants in the labor market. Dismissal of their federal claims is therefore warranted for this reason as well.

III. APPELLEES' GEORGIA RICO CLAIMS FAIL AS A MATTER OF LAW.

A. Appellees Fail to Allege Facts Sufficient to Establish that Mohawk Is Liable.

Appellees concede that, "[u]nder Georgia law, a corporation *qua* corporation, cannot be held to answer for a crime," *Byrne* v. *Nezhat*, 261 F.3d 1075, 1105 (11th Cir. 2001), unless the corporation is held vicariously liable for the actions of its agents or employees. ABr. at 37. Appellees also concede that vicarious liability attaches to a corporation in only two circumstances: (1) where the statute defining the crime "clearly indicates a legislative purpose to impose liability" on corporations, O.C.G.A. § 16-2-22(a)(1); or (2) where "the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment on behalf of the corporation," *id.* § 16-2-22(a)(2). Appellees, however, cannot meet either of these tests.

1. A Corporation Is Not Generally Liable Under Georgia RICO.

Appellees renew their argument—rejected by the District Court below—that Mohawk may be held liable on Georgia RICO claims under O.C.G.A. § 16-2-22(a)(1) because Georgia RICO "clearly indicates a legislative purpose to impose liability" on corporations. The Georgia Supreme Court, however, has

directly and explicitly rejected this basis for liability. That court has explained that "[a] corporation may also face prosecution under O.C.G.A. § 16-2-22(a)(1) for a crime if the statute defining the crime clearly indicates a legislative purpose to impose liability on a corporation. [Georgia] RICO, however, is not such a statute." *Clark* v. *Sec. Life Ins. Co.*, 509 S.E.2d 602, 603 n.1 (Ga. 1998); *see also Cobb County* v. *Jones Group*, 460 S.E.2d 516, 521 (Ga. Ct. App. 1995) (Georgia RICO claims do not meet § 16-2-22(a)(1). As this Court has recognized, that is both the beginning and end of the inquiry. *See Byrne*, 261 F.3d at 1105 ("Under Georgia law, a corporation . . . could not violate the Georgia RICO statute." (citing *Cobb County*, 460 S.E.2d at 521)); *see generally Carringer* v. *Rodgers*, 331 F.3d 844, 847 (11th Cir. 2003) (Court of Appeals is "bound by the Georgia Supreme Court's interpretation of state law").

Appellees argue that *Clark*'s conclusion is dicta, ABr. at 39-40, but that is wrong. The *Clark* court considered the applicability of § 16-2-22(a)(1) to Georgia's RICO statute for the exact same reason that Appellees have asked to apply it here—to determine whether a corporation should be held liable for alleged RICO violations.[15] *Clark*, 509 S.E.2d. at 602-603.

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[15] For the same reason, Appellees wrongly disregard the holding in *Cobb County*, which they dismiss as "a passing parenthetical comment." ABr. at 39. It was only *after* the court determined that § 16-2-22(a)(1) did not apply to the RICO statute

Despite the Georgia Supreme Court's clear holding to the contrary on an issue of state law, Appellees attempt to reargue the issue by selectively quoting from various provisions of the Georgia code. All of these arguments are without merit. For example, Appellees claim that RICO charges should fall within § 16-2-22(a)(1) because "the RICO statute imposes liability on any 'person' that engages in the proscribed conduct," ABr. at 38, and Georgia's criminal code generally defines that term in a broad manner. *See* O.C.G.A. § 16-1-3(12) (1982). Using the code's *general* definition of a person would, of course, eviscerate the vicarious liability provisions of O.C.G.A. § 16-2-22 altogether, as every single crime within

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that the court proceeded to inquire into the applicability of § 16-2-22(a)(2). *See Cobb County*, 460 S.E.2d at 521. Appellees also attempt to avoid controlling precedent in *Clark* and *Byrne* by citing non-controlling, intermediate state court cases. ABr. 36 n.38. Not a single one of the courts in Appellees' cited cases even considered, let alone decided, whether Georgia's RICO statute satisfied the test set forth in § 16-2-22(a)(1). *See Cotton, Inc.* v. *Phil-Dan Trucking, Inc.*, 507 S.E.2d 730 (Ga. 1998) (no mention); *Fed. Ins. Co.* v. *Westside Supply Co.*, 590 S.E.2d 224 (Ga. Ct. App. 2003) (same); *Shoenbaum Ltd.* v. *Lenox Pines, L.L.C.*, 585 S.E.2d 643 (Ga. Ct. App. 2003) (same). These courts could just as easily have held their respective corporate defendants subject to liability under § 16-2-22(a)(2) as under § 16-2-22(a)(1). Such decisions have no precedential value. *See Hooten* v. *State*, 442 S.E.2d 836, 840 (Ga. Ct. App. 1994) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). The court in *Reaugh* v. *Inner Harbour Hosp.*, 447 S.E.2d 617 (Ga. Ct. App. 1994), simply assumed (without any discussion whatsoever) that a corporation was a person for RICO purposes. *Id.* at 621-622. To the extent that this passing comment was persuasive intermediate appellate court precedent, that precedent was overruled four years later by the Georgia Supreme Court in *Clark*.

Title 16 of the Georgia Code would be applicable to corporations. It would also render numerous provisions within the Georgia code that explicitly differentiate "person[s]" from "corporation[s]" redundant and meaningless.[16]

Appellees also cite § 16-14-6 and § 16-14-15 of Georgia RICO, which provide for relief against and the registration of corporations in certain circumstances, as evidence of legislative intent to hold corporations criminally liable for RICO violations. ABr. at 38-39. But these provisions do not imply that RICO claims against corporations as *persons* fall within the ambit of § 16-2-22(a)(1); rather, they provide certain forms of relief and impose certain requirements to ensure that corporations are not turned into *enterprises* by individual RICO defendants. *See* O.C.G.A. § 16-14-4 (imposing RICO liability only on "person[s]" who maintain control of "any enterprise," but not imposing liability on the enterprise itself); *see also Five Star Partners, L.P.* v. *Vincent Netherlands Properties, B.V. (In re Five Star Properties, L.P.)*, 169 B.R. 994, 1003 (Bankr. N.D. Ga. 1994) (purpose of § 16-14-15 is to prevent "the remote possibility that an alien criminal *enterprise* might thereby be encouraged to file a

[16] *See, e.g.*, O.C.G.A. § 16-13-32(b) (2004) ("It shall be unlawful for any person or corporation, knowing the drug related nature of the object, to sell, lend, rent, lease, give, exchange, or otherwise distribute to any person any drug related object."); *id.* §§ 16-13-32.1-32.2; *see also*, *e.g.*, *id.* § 16-13-72 ("it shall be unlawful for any person, firm, corporation, or association to sell, give away, barter, exchange,

report or register that it would not otherwise file.").[17] Accordingly, the statutes cited by Appellees do not provide a "clear[] indicat[ion]" that Georgia wanted to hold corporations vicariously liable for state-law RICO violations.

2. Appellees Have Not Pled Corporate Liability for a Georgia RICO Violation Pursuant to O.C.G.A. § 16-2-22(a)(2).

To plead a Georgia RICO claim against Mohawk under § 16-2-22(a)(2), Appellees must allege that the illegal conduct was "authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official." Appellees' complaint does not mention the conduct of Mohawk's officers or directors at all, much less describe "which [Mohawk] agent was responsible for [Mohawk's] violation of the Georgia RICO statute." *Byrne*, 261 F.3d at 1105.[18]

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distribute, or possess in this state any dangerous drug").

[17] Indeed, Appellees betray their failure to recognize this distinction when they cite § 16-14-6(a)(3), which permits courts to "[o]rder[] the dissolution or reorganization of any *enterprise*."

[18] Instead, Appellees refer only to the conduct of unnamed "supervisors," R1, 1, ¶¶ 20-21, 28, 31, who do not qualify as "managerial official[s]" under Georgia law. *See* O.C.G.A. § 16-2-22(b)(2) (1968) ("managerial official[s]" include "officer[s] of the corporation or any other agent who has a position of comparable authority for the formulation of corporation policy or the supervision of subordinate employees"). "[O]nly 'top' management is intended to be covered" by the statute. *Military Circle Pet Ctr. No. 94, Inc. v. State*, 353 S.E.2d 555, 559 (Ga. Ct. App. 1987), *rev'd on other grounds*, 360 S.E.2d 248 (Ga. 1987).

Appellees merely cite to one state criminal case dealing with state-law indictment requirements to defend the sufficiency of their pleadings regarding Mohawk's potential liability under § 16-2-22(a)(2). *See* ABr. at 41. This case, however, is silent on *federal* civil pleading requirements. *See Guillen* v. *Kuykendall*, 470 F.2d 745, 747 (5th Cir. 1972) ("sufficiency of pleadings are determined by federal law, not local law"). Under the federal rules of pleading, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe* v. *Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) (quotation omitted). Appellees simply have not alleged that an officer or the Board of Directors authorized the conduct at issue. Accordingly, their Georgia RICO claim must be dismissed.

B. Appellees Cannot Establish Proximate Causation Under Georgia RICO.

Appellees' Georgia RICO claims rest on the sole predicate act of the knowing acceptance of false identification documents in violation of 18 U.S.C. § 1546. *See* ABr. at 34 n.36. Thus, Appellees' theory of proximate cause for their Georgia RICO claim is even more attenuated than the one they offer for their federal RICO claim. At bottom, Appellees' damages theory rests upon illegal hiring, not the acceptance of false documents. As such, their already-attenuated

damages theory under Federal RICO lacks any credible causal nexus under Georgia RICO. Accordingly, Appellees' Georgia RICO claim should be dismissed. *See* MBr. at 14-24, 27-28; *supra* Section II.

IV. APPELLEES' UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW.

Finally, Appellees continue to press their unjust enrichment claim despite the black letter rule that unjust enrichment lies only where the parties are not governed by an express contract. *St. Paul Mercury Ins. Co.* v. *Meeks*, 508 S.E.2d 646, 647-648 (Ga. 1998); *accord Stowers* v. *Hall*, 283 S.E.2d 714, 714 (Ga. Ct. App. 1981) ("There can be no recovery on quantum meruit when the action is based on an express contract."). Appellees' only response to this irrefutable proposition is to argue that they "have not alleged any express contract in which Appellees accepted a particular wage." ABr. at 42. Appellees' complaint belies this assertion. Appellees allege that they are "current and former hourly employees of Mohawk whose wages have been depressed." R1 1, ¶ 1. "[H]ourly employees" who receive "wages" for their work necessarily work pursuant to an express contract, regardless of whether that contract is written or oral. *See Floyd* v. *Lamar Ferrell Chevrolet, Inc.*, 285 S.E.2d 218, 219 (Ga. Ct. App. 1981) ("appellant's allegations that she was employed by appellee for an indefinite period at a fixed monthly wage sets forth a legally binding contract for

one month's employment at the agreed wage" (internal quotation omitted)); *see also Ades* v. *Werther*, 567 S.E.2d 340, 342-343 (Ga. Ct. App. 2002) (rejecting trial court's finding of unjust enrichment on the grounds that oral promise to repay loan was a contract).

Indeed, the only way Appellees could bring a claim for unjust enrichment against Mohawk would be to allege that Mohawk never agreed to pay them any wages for the work that they performed. *See Fleming* v. *Citizens & Southern Nat'l Bank*, 253 S.E.2d 76, 78 (Ga. 1979) (action for unjust enrichment lies only where "no consideration or benefit inures" to the party providing service to the other party); *United Companies Lending Corp.* v. *Coates*, 520 S.E.2d 236, 238 (Ga. Ct. App. 1999) (same); *Restatement (First) of Restitution* § 107(1) (1937) (person "who, pursuant to a contract with another, has . . . conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain"). But if that were the case, then Appellees' RICO claims—that Mohawk "depressed" the wages available to Appellees—would be rendered meaningless because there would be no wage to depress.[19]

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[19] Appellees either misapprehend or misrepresent Georgia state law when they argue that their unjust enrichment claims should survive Mohawk's motion to dismiss because "an unjust enrichment claim may co[-]exist with an implied contract." ABr. at 43. It is certainly true that a plaintiff can bring a claim for breach of contract (whether express or implied in fact) coupled with a claim in the

Appellees seek to ignore Georgia law and circumvent the requirements for an unjust enrichment claim by analogizing their claim to that of plaintiffs in civil antitrust cases. They offer no support for the notion that Georgia courts would look to such a different body of law when considering an equitable claim for unjust enrichment. In any event, Appellees are not like antitrust victims, because antitrust victims suffer *direct* harm as consumers when they pay inflated prices as a result of a company's monopolistic conduct, whereas Appellees have not paid anything to Mohawk at all. Instead, Appellees' asserted harm derives solely from the effect of Mohawk's alleged conduct on bargained-for contract rates. Under their theory, *any* employee receiving wages below a market would have an "equitable" claim to the difference. Such an approach is simply wrong as a matter of law. *Bowman* v. *McDonough Realty Co., Inc.*, 237 S.E.2d 647, 648 (Ga. Ct. App. 1977) (courts do not "make a bargain for the parties" where consideration was exchanged).

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alternative for unjust enrichment should the court find that no contract between the parties existed. Here, however, the existence of a contract under Georgia law between an employer and employee is not in doubt. And, as set forth above, such a contract precludes recovery for unjust enrichment.

CONCLUSION

For these reasons, and those provided in Mohawk's opening brief, the portions of the District Court's order denying dismissal of Appellees' Complaint should be reversed with instructions to dismiss Appellees' Complaint with prejudice.

Respectfully submitted,

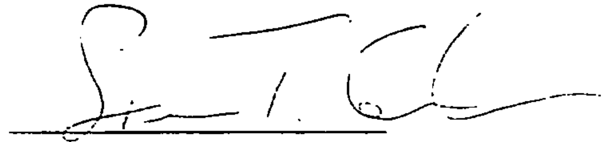
ATTORNEYS FOR APPELLANT

By: ______________________

Dated: November 5, 2004.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6935 words.



CERTIFICATE OF FILING AND SERVICE

This is to certify that I have this day filed the foregoing by sending it by third-party commercial carrier for delivery to the clerk within three calendar days to:

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This is also to certify that I have this day served the Appellees with the foregoing by having a copy of same deposited in the United States Mail in an envelope, with sufficient First Class postage affixed thereon, properly addressed to their counsel of record as follows:

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